

SENATE BILL 272

K3

2lr0781

By: ~~Senators Peters, Astle, Kittleman, and Klausmeier~~ Pugh, Young, Astle, Glassman, Kelley, Kittleman, Klausmeier, Mathias, Middleton, and Muse

Introduced and read first time: January 26, 2012
Assigned to: Finance

Committee Report: Favorable with amendments
Senate action: Adopted
Read second time: March 19, 2012

CHAPTER _____

1 AN ACT concerning

2 **Labor and Employment – Workplace Fraud Act – Revisions**

3 FOR the purpose of ~~repealing a certain presumption that certain work performed by~~
4 ~~an individual creates an employer–employee relationship except under certain~~
5 ~~circumstances; defining the term “independent contractor” as used in the~~
6 ~~Workplace Fraud Act; making conforming changes; establishing an exception~~
7 ~~for an employer that produces certain documents for inspection to the~~
8 ~~presumption that an employer–employee relationship exists for purposes of the~~
9 ~~Workplace Fraud Act; authorizing an employer to comply with a certain~~
10 ~~requirement to provide records by producing copies of the records; altering the~~
11 ~~number of days within which an employer is required to produce certain~~
12 ~~records; requiring the Commissioner to take certain action regarding an alleged~~
13 ~~violation of the Workplace Fraud Act within a certain time after the~~
14 ~~Commissioner receives certain records from an employer; providing that an~~
15 ~~employer is entitled to a certain hearing within a certain number of days after~~
16 ~~the hearing is requested unless the right is waived; altering a certain provision~~
17 ~~of law regarding the issuance of citations by the Commissioner for violations of~~
18 ~~the Workplace Fraud Act; and generally relating to the Workplace Fraud Act.~~

19 ~~BY renumbering~~

20 ~~Article – Labor and Employment~~

21 ~~Section 3–901(c) through (h), respectively~~

22 ~~to be Section 3–901(f) through (i), respectively~~

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter deleted from existing law.

Underlining indicates amendments to bill.

~~Strike out~~ indicates matter stricken from the bill by amendment or deleted from the law by amendment.



1 ~~Annotated Code of Maryland~~
2 ~~(2008 Replacement Volume and 2011 Supplement)~~

3 ~~BY adding to~~
4 ~~Article – Labor and Employment~~
5 ~~Section 3–901(e)~~
6 ~~Annotated Code of Maryland~~
7 ~~(2008 Replacement Volume and 2011 Supplement)~~

8 BY repealing and reenacting, with amendments,
9 Article – Labor and Employment
10 ~~Section 3–903 and 3–904~~ 3–903, 3–905(d) and (e), 3–906, and 3–913
11 ~~Annotated Code of Maryland~~
12 ~~(2008 Replacement Volume and 2011 Supplement)~~

13 BY adding to
14 Article – Labor and Employment
15 Section 3–903.1
16 Annotated Code of Maryland
17 (2008 Replacement Volume and 2011 Supplement)

18 BY repealing and reenacting, without amendments,
19 Article – Labor and Employment
20 Section 3–905(c)
21 Annotated Code of Maryland
22 (2008 Replacement Volume and 2011 Supplement)

23 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF
24 MARYLAND, That ~~Section(s) 3–901(c) through (h), respectively, of Article – Labor and~~
25 ~~Employment of the Annotated Code of Maryland be renumbered to be Section(s)~~
26 ~~3–901(f) through (i), respectively.~~ the Laws of Maryland read as follows:

27 ~~SECTION 2. AND BE IT FURTHER ENACTED, That the Laws of Maryland~~
28 ~~read as follows:~~

29 **Article – Labor and Employment**

30 ~~3–901.~~

31 ~~(E) “INDEPENDENT CONTRACTOR” MEANS AN INDIVIDUAL WHO IS NOT~~
32 ~~AN EMPLOYEE FOR PURPOSES OF THE FEDERAL INSURANCE CONTRIBUTIONS~~
33 ~~ACT AND THE FEDERAL UNEMPLOYMENT TAX ACT, BASED ON APPLICATION OF~~
34 ~~THE 20 FACTORS SET FORTH IN THE INTERNAL REVENUE SERVICE REVENUE~~
35 ~~RULING 87–41, ISSUED UNDER 26 C.F.R. 31.3306(i)–1 AND 26 C.F.R.~~
36 ~~31.3121(d)–1.~~

1 3-903.

2 (a) An employer may not fail to properly classify an individual who performs
3 work for remuneration paid by the employer.

4 (b) An employer has failed to properly classify an individual when an
5 employer-employee relationship exists [as determined under subsection (c) of this
6 section] but the employer has not classified the individual as an employee.

7 (c) ~~¶(1) For~~ **EXCEPT AS PROVIDED IN § 3-903.1 OF THIS SUBTITLE,**
8 **FOR** purposes of enforcement of this subtitle only, work performed by an individual for
9 remuneration paid by an employer shall be presumed to create an employer-employee
10 relationship, unless:

11 (i) the individual is an exempt person; or

12 (ii) an employer demonstrates that:

13 1. the individual who performs the work is free from
14 control and direction over its performance both in fact and under the contract;

15 2. the individual customarily is engaged in an
16 independent business or occupation of the same nature as that involved in the work;
17 and

18 3. the work is:

19 A. outside of the usual course of business of the person
20 for whom the work is performed; or

21 B. performed outside of any place of business of the
22 person for whom the work is performed.

23 (2) Work is outside of the usual course of business of the person for
24 whom it is performed under paragraph (1) of this subsection if:

25 (i) the individual performs the work off the employer's
26 premises;

27 (ii) the individual performs work that is not integrated into the
28 employer's operation; or

29 (iii) the work performed is unrelated to the employer's business.

30 (3) By contract, an employer may engage another business entity,
31 which may have its own employees, to do the same type of work in which the employer

1 engages, at the same location where the employer is working, without establishing an
2 employer–employee relationship between the two contracting entities.

3 (d) The Commissioner shall adopt regulations to explain further and provide
4 specific examples of the application of subsection (c) of this section.

5 **3–903.1.**

6 **THE PRESUMPTION THAT AN EMPLOYER–EMPLOYEE RELATIONSHIP**
7 **EXISTS UNDER § 3–903(C)(1) OF THIS SUBTITLE DOES NOT APPLY IF:**

8 **(1) AN EMPLOYER PRODUCES FOR INSPECTION BY THE**
9 **COMMISSIONER:**

10 **(I) A WRITTEN CONTRACT, SIGNED BY THE EMPLOYER AND**
11 **BUSINESS ENTITY, THAT:**

12 **1. DESCRIBES THE NATURE OF THE WORK TO BE**
13 **PERFORMED BY THE BUSINESS ENTITY;**

14 **2. DESCRIBES THE REMUNERATION TO BE PAID FOR**
15 **THE WORK PERFORMED BY THE BUSINESS ENTITY; AND**

16 **3. INCLUDES AN ACKNOWLEDGEMENT BY THE**
17 **BUSINESS ENTITY OF THE BUSINESS ENTITY’S OBLIGATIONS UNDER THIS**
18 **ARTICLE TO:**

19 **A. WITHHOLD, REPORT, AND REMIT PAYROLL TAXES**
20 **ON BEHALF OF ALL EMPLOYEES WORKING FOR THE BUSINESS ENTITY;**

21 **B. PAY UNEMPLOYMENT INSURANCE TAXES FOR ALL**
22 **EMPLOYEES WORKING FOR THE BUSINESS ENTITY; AND**

23 **C. MAINTAIN WORKERS’ COMPENSATION**
24 **INSURANCE;**

25 **(II) AN AFFIDAVIT SIGNED BY THE BUSINESS ENTITY**
26 **INDICATING THAT THE BUSINESS ENTITY IS AN INDEPENDENT CONTRACTOR**
27 **WHO IS AVAILABLE TO WORK FOR OTHER BUSINESS ENTITIES;**

28 **(III) A CURRENT CERTIFICATE OF STATUS OF THE BUSINESS**
29 **ENTITY, ISSUED BY THE STATE DEPARTMENT OF ASSESSMENTS AND TAXATION,**
30 **INDICATING THAT THE BUSINESS ENTITY IS IN GOOD STANDING; AND**

1 (IV) PROOF THAT THE BUSINESS ENTITY HOLDS ALL
 2 OCCUPATIONAL LICENSES REQUIRED BY STATE AND LOCAL AUTHORITIES FOR
 3 THE WORK PERFORMED; AND

4 (2) THE EMPLOYER PROVIDED TO EACH INDIVIDUAL CLASSIFIED
 5 AS AN INDEPENDENT CONTRACTOR OR EXEMPT PERSON A WRITTEN NOTICE
 6 UNDER § 3-914 OF THIS SUBTITLE.

7 ~~§ 904.~~

8 ~~(a) An employer may not knowingly fail to properly classify an individual~~
 9 ~~who performs work for remuneration paid by the employer.~~

10 ~~(b) An employer has knowingly failed to properly classify an individual~~
 11 ~~when:~~

12 ~~(1) an employer-employee relationship exists [as determined under §~~
 13 ~~3-903(e) of this subtitle]; and~~

14 ~~(2) the employer has knowingly failed to properly classify the~~
 15 ~~individual as an employee.~~

16 ~~(c) The Commissioner shall consider, as strong evidence that the employer~~
 17 ~~did not knowingly fail to properly classify an individual, whether:~~

18 ~~(1) before a complaint was filed against the employer or the~~
 19 ~~Commissioner began an investigation of the employer, the employer:~~

20 ~~(i) sought and obtained evidence that the individual:~~

21 ~~1. is an exempt person; or~~

22 ~~2. as an independent contractor;~~

23 ~~A. withholds, reports, and remits payroll taxes on behalf~~
 24 ~~of all individuals working for the independent contractor;~~

25 ~~B. pays unemployment insurance taxes for all~~
 26 ~~individuals working for the independent contractor; and~~

27 ~~C. maintains workers' compensation insurance; and~~

28 ~~(ii) provided to the exempt person or independent contractor a~~
 29 ~~written notice as required by § 3-914 of this subtitle; or~~

30 ~~(2) the employer;~~

~~(i) 1. classifies all workers who perform the same or substantially the same tasks for the employer as independent contractors; and~~

~~2. reports the income of the workers to the Internal Revenue Service as required by federal law; and~~

~~(ii) has received a determination from the Internal Revenue Service that the individual or a worker who performs the same or substantially the same task as the individual is an independent contractor.~~

~~(d) The Commissioner shall adopt regulations to provide guidance as to what constitutes the evidence relevant to the determination of whether an employer knowingly failed to properly classify an employee.~~

~~3-905.~~

(c) The Commissioner may enter a place of business or work site to:

(1) observe work being performed;

(2) interview individuals on the work site, including those identified as employees and independent contractors; and

(3) review and copy records.

(d) (1) The Commissioner may require each employer to:

[(1)] (I) SUBJECT TO PARAGRAPH (2) OF THIS SUBSECTION, identify and produce FOR COPYING OR INSPECTION all records relevant to the classification of each individual;

[(2)] (II) attest to the truthfulness of each record that is copied in accordance with subsection (c)(3) of this section OR EACH COPY OF A RECORD THAT IS PROVIDED TO THE COMMISSIONER UNDER SUBPARAGRAPH (I) OF THIS PARAGRAPH and to sign the copy; or

[(3)] (III) at the option of the employer, submit a written statement about the classification of each employee on the form provided by the Commissioner, with any relevant records attached.

(2) AN EMPLOYER MAY COMPLY WITH A REQUIREMENT TO PRODUCE RECORDS UNDER PARAGRAPH (1)(I) OF THIS SUBSECTION BY PRODUCING COPIES OF THE RECORDS.

1 (e) An employer that fails to produce records FOR COPYING OR
2 INSPECTION or a written statement under subsection (d) of this section within [15]
3 30 business days after the Commissioner's request, OR AN EXTENSION OF TIME
4 MUTUALLY AGREED ON BY BOTH PARTIES, shall be subject to a fine not exceeding
5 \$500 per day for each day the records are not produced.

6 3-906.

7 (a) [If, after investigation] AFTER THE EMPLOYER HAS PROVIDED ALL OF
8 THE RECORDS REQUESTED UNDER § 3-905(D) OF THIS SUBTITLE, [the
9 Commissioner determines that an employer has violated this subtitle or a regulation
10 adopted under this subtitle,] the Commissioner shall [promptly] issue a citation to the
11 employer OR CLOSE THE INVESTIGATION WITHIN 90 DAYS.

12 (b) Each citation shall:

13 (1) describe in detail the nature of the alleged violation;

14 (2) cite the provision of this subtitle or any regulation that the
15 employer is alleged to have violated; and

16 (3) state the civil penalty, if any, that the Commissioner proposes to
17 assess.

18 (c) Within a reasonable time after issuance of a citation, the Commissioner
19 shall send by certified mail to the employer:

20 (1) a copy of the citation; and

21 (2) notice of the opportunity to request a hearing.

22 (d) Within 15 days after an employer receives a notice under subsection (c) of
23 this section, the employer may submit a written request for a hearing on the citation
24 and proposed penalty.

25 (e) If a hearing is not requested within 15 days, the citation, including any
26 penalties, shall become a final order of the Commissioner.

27 (f) (1) If the employer requests a hearing, the Commissioner shall
28 delegate to the Office of Administrative Hearings the authority to hold a hearing and
29 issue findings of fact, conclusions of law, and an order, and assess a penalty under §
30 3-909 of this subtitle in accordance with Title 10, Subtitle 2 of the State Government
31 Article.

1 **(2) THE EMPLOYER IS ENTITLED TO A HEARING WITHIN 90 DAYS**
2 **AFTER A TIMELY REQUEST MADE UNDER THIS SUBSECTION, UNLESS THE**
3 **EMPLOYER WAIVES THAT RIGHT.**

4 (g) Within 15 days after a request, in accordance with Title 10, Subtitle 6 of
5 the State Government Article and the applicable regulations of the Department and
6 the Office of Administrative Hearings, the Commissioner shall provide copies of all
7 relevant evidence, including a list of potential witnesses, on which the Commissioner
8 intends to rely at any administrative hearing under this subtitle.

9 (h) The Commissioner has the burden of proof to show that an employer has
10 knowingly failed to properly classify an individual as an employee.

11 (i) A decision of an administrative law judge issued in accordance with Title
12 10, Subtitle 2 of the State Government Article shall become a final order of the
13 Commissioner.

14 (j) Any party aggrieved by a final order of the Commissioner under
15 subsection (i) of this section may seek judicial review and appeal under §§ 10–222 and
16 10–223 of the State Government Article.

17 3–913.

18 (a) Where, after investigation, the Commissioner issues a citation for a
19 KNOWING violation of this subtitle or regulations adopted under this subtitle by an
20 employer engaged in work on a contract with a public body, the Commissioner shall
21 promptly notify the public body.

22 (b) (1) On notification, the public body shall withhold from payment due
23 the employer an amount that is sufficient to:

24 (i) pay restitution to each employee for the full amount of
25 wages due; and

26 (ii) pay any benefits, taxes, or other contributions that are
27 required by law to be paid on behalf of the employee.

28 (2) The public body shall release:

29 (i) on issuance of a favorable final order of a court or an
30 administrative unit, the full amount of the withheld funds; and

31 (ii) on an adverse final order of a court or an administrative
32 unit, the balance of the withheld funds after all obligations are satisfied under
33 paragraph (1) of this subsection.

1 SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect
2 ~~October 1, 2012~~ July 1, 2012.

Approved:

Governor.

President of the Senate.

Speaker of the House of Delegates.